

ISSUES

- (1) Is claimant entitled to a review and modification of this Award under K.S.A. 44-528?
- (2) Is either party entitled to attorney fees?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was originally decided by Administrative Law Judge Clark in his Award dated November 25, 1997. Judge Clark denied claimant benefits, finding that claimant's exposure to a chemical substance while working for United Parcel Service resulted in a temporary aggravation of her airways with no permanent impairment resulting therefrom. This decision was affirmed by the Appeals Board in its Order of July 23, 1998. The matter was appealed to the Kansas Court of Appeals which, in its decision of April 30, 1999, found the Board's decision to be supported by substantial competent evidence, and affirmed same.

Claimant requests the Board consider her request for permanent impairment, future medical treatment and attorney fees. In support of her position, claimant provided her testimony as well as the testimony of Richard Samuel Piazza, D.O., board certified by the American College of Osteopathic Family Physicians. Dr. Piazza testified that claimant was suffering increased symptoms and felt that there was some type of relationship between the ongoing treatment he was providing and chemical exposure in July 1995. Dr. Piazza did, however, acknowledge that claimant's condition had not changed significantly since the original award in 1997.

The Administrative Law Judge refused to grant claimant additional permanent disability benefits or future medical treatment, finding that these issues had been resolved at the time of the original Award and, as such, res judicata would apply. The Appeals Board agrees.

Larson's Workers' Compensation Law, § 79.72(a) (1997), states:

As to res judicata in compensation-related matters, the beginning point is recognition of the proposition that res judicata does apply to the decisions of compensation Boards and Commissioners no less than to the decisions of a court.

In addition, the Kansas Supreme Court held in Neunzig v. Seaman U.S.D. No. 345, 239 Kan. 654, 722 P.2d 569 (1986), that the doctrine of res judicata applies to administrative proceedings when the agency acts in a judicial capacity.

In this instance, the Administrative Law Judge, the Appeals Board and the Kansas Court of Appeals found claimant's condition to be temporary and found claimant to not be entitled to future medical treatment. Claimant attempts to relitigate those issues with evidence which was in existence at the time of the original award. Dr. Piazza was claimant's treating doctor in 1995 at the time she suffered the exposure and continues treating her through this date. Dr. Piazza acknowledged that nothing significant had changed during this period of time.

In order for res judicata to apply to litigation, there must be "(1) judgment on merits in earlier action, (2) identity of parties or privies in two suits, and (3) identity of cause of action in both suits." Urban v. King, 995 F.Supp. 1251 (D.Kan. 1998). Res judicata prevents a party from relitigating issues which have been decided adversely to that party. Hoelting Enterprises v. Nelson, 23 Kan. App. 2d 228, 929 P.2d 183 (1996). Claimant asks the Division to reexamine a finding of a past fact which is prohibited generally. Randall v. Pepsi-Cola Bottling Co., Inc., 212 Kan. 392, 510 P.2d 1190 (1973).

In this instance, the Appeals Board finds that claimant's attempt to relitigate claimant's entitlement to a permanent award and future medical treatment is inappropriate.

With regard to claimant's request for attorney fees, K.S.A. 1998 Supp. 44-536 allows for reasonable attorney fees in the event an attorney renders service to an employee subsequent to the ultimate disposition of the initial and original claim. However, K.S.A. 1998 Supp. 44-536(g) states "[i]f the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent."

When benefits are denied, the rendering of attorney fees is not mandatory but is in the discretion of the Director. The Administrative Law Judge in this instance found attorney fees to be inappropriate, as claimant attempts to relitigate findings of past fact based upon evidence which was available at the time of the original award. The Appeals Board finds the denial of attorney fees in this matter to be appropriate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated April 12, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Lawrence D. Greenbaum, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director